

**Not To Be Published:**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

JOHN MORRELL & CO.,

Plaintiff,

vs.

ISO PIG LTD.,

Defendant.

No. C 02-4116-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT**

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Plaintiff John Morrell & Company filed this action on December 23, 2002, against defendant ISO Pig, Ltd., alleging breach of a contract for the sale and purchase of market hogs. ISO Pig answered John Morrell's Complaint on March 25, 2003. In its Answer, ISO Pig denied John Morrell's breach-of-contract claim, asserted an affirmative defense of unenforceability of the underlying contract on public policy grounds, and pleaded a counterclaim for damages for fraudulent inducement to enter into the contract. John Morrell replied to ISO Pig's counterclaim on April 11, 2003.

This matter comes before the court pursuant to John Morrell's January 1, 2004, Motion For Summary Judgment (docket no. 13), which consisted of the following: a motion; a memorandum in support, to which John Morrell attached copies of several unpublished decisions upon which John Morrell relied; and a statement of purportedly undisputed facts, to which John Morrell attached several exhibits. ISO Pig responded to John Morrell's motion on January 27, 2004, by filing a two-page Resistance To Motion For Summary Judgment (docket no. 14), but nothing else. John Morrell then filed a Reply

on February 5, 2004 (docket no. 15). In its Reply, John Morrell referred to the filing by ISO Pig of “its resistance motion and a supporting affidavit,” apparently referring to an affidavit by John Gernhart. However, no copy of such an affidavit was attached to the copy of ISO Pig’s Resistance filed with the Clerk of Court. Therefore, by order dated March 16, 2004, the court directed ISO Pig to file the missing affidavit in support of its resistance to summary judgment by March 23, 2004. On March 22, 2004, ISO Pig filed both a Response To Plaintiff’s John Morrell & Co.’s [sic] Statement Of Undisputed Facts and an Affidavit Of John Gernhart (docket no. 17). With that filing, the court deemed John Morrell’s motion for summary judgment fully submitted.

The parties agree that the following facts are undisputed. ISO Pig is an Iowa corporation with its principal place of business in Kingsley, Iowa. John Gernhart is the president of ISO Pig. ISO Pig and John Morrell entered into a Minimum Value Protection or “MVP” Program Participation Agreement on February 12, 1998. *See* Plaintiff’s Exhibit 3. Under the MVP Agreement, ISO Pig agreed to sell John Morrell one-hundred percent of its production of market hogs during the three-year term of the MVP Agreement, while John Morrell agreed to pay a minimum of \$40.00 per hundredweight (cwt.) for those hogs. If the market price for market hogs was less than \$40.00 per cwt., ISO Pig was still paid \$40.00 per cwt., but the difference between that contract price and the market price was placed on a ledger as a negative balance against ISO Pig. When the market price was more than \$40.00 per cwt., a portion of the excess was used to reduce ISO Pig’s negative balance. At the end of the three-year term of the MVP Agreement, ISO Pig was either required to pay any existing negative balance or entitled to receive any excess due from John Morrell. In 2001, at the end of the MVP Agreement, ISO Pig in fact had a negative balance in its ledger account of \$923,160.58. Consequently, on April 30, 2001, in an effort to reduce ISO Pig’s negative ledger balance, the parties entered into

a second agreement, identified herein as the Renegotiated Agreement. *See* Plaintiff's Exhibit 5. Under the terms of the Renegotiated Agreement, ISO Pig agreed to deliver 35,000 head of its production of hogs per year to John Morrell during each of the three years of the Renegotiated Agreement. When the market price for hogs, as defined in the Renegotiated Agreement, was above \$40.99 per cwt., ISO Pig received a portion of the excess, but the remainder was used to reduce ISO Pig's negative ledger balance. However, ISO Pig stopped delivering market hogs to John Morrell in June of 2002.

The following factual contentions by John Morrell are disputed by ISO Pig. John Morrell contends that it performed all of its obligations under the MVP Agreement during its term by accepting ISO Pig's market hogs and paying \$40.00 per cwt. for those hogs. John Morrell also contends that it performed all of its obligations under the Renegotiated Agreement by accepting ISO Pig's market hogs and by paying ISO Pig pursuant to the terms of that agreement. John Morrell asserts that ISO Pig currently has a negative balance in its ledger account in the amount of \$826,613.58, which ISO Pig has not paid. John Morrell asserts, based on John Gernhart's deposition testimony, that ISO Pig's only reason for not paying John Morrell this amount is that ISO Pig does not have the money to do so.

ISO Pig contends that factual disputes are generated by the affidavit of John Gernhart submitted with its resistance to John Morrell's motion for summary judgment. In that affidavit, Mr. Gernhart avers that ISO Pig was induced to sign the MVP Agreement based upon representations by John Morrell that ISO Pig would be paid for hogs sold to John Morrell at a price based on the three-day average of the Iowa/Southern Minnesota Practical Top market price plus \$1.50 per cwt. However, at some point after the contract was signed, the USDA stopped issuing the Iowa/Southern Minnesota Market report. At that point, Mr. Gernhart contends that John Morrell changed the contract price, without

ISO Pig's agreement, by using "the three-day weight average hog price." The new price, Mr. Gernhart avers, was based on the price of dress beef, rather than live weight, and the new price, consequently, lowered the effective price that John Morrell was paying to ISO Pig. Mr. Gernhart avers that the change resulted in a minimum difference of \$5.00 per head as compared to the Iowa/Southern Minnesota Practical Top price. Mr. Gernhart contends, further, that this price change, coupled with market conditions, resulted in a "significant[ly] higher ledger balance being generated under the contract," presumably meaning a significantly larger *negative* balance. Mr. Gernhart contends that the price change was a breach of contract by John Morrell, which resulted in significant damages to ISO Pig. He also contends, "That as President of ISO, we [sic] confronted John Morrell representations [sic; representatives?] including Dave Poppen who personally advised that the change in prices resulted in lowering the purchase price that John Morrell was paying for the hogs and advised that we had no choice but to continue with the contract as they had arbitrarily and capriciously changed the price for calculating the purchase price of the hogs." Gernhart Affidavit at 2, ¶ 7. ISO Pig neither cites nor supplies copies of any documents supporting Mr. Gernhart's factual contentions.

As this court has explained on a number of occasions, when applying the standards of Rule 56 of the Federal Rules of Civil Procedure providing for summary judgment, the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). In reviewing the record, the court must view all of the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Quick*, 90 F.3d at 1377 (same). Procedurally,

the moving party bears “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); see also *Rose-Maston v. NME Hosps., Inc.*, 133 F.3d 1104, 1107 (8th Cir. 1998); *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). When the moving party has carried its burden under Rule 56(c), the party opposing summary judgment is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach v. Sears*, 49 F.3d 1324, 1325 (8th Cir. 1995). An issue of material fact is “genuine” if it has a real basis in the record. *Hartnagel*, 953 F.2d at 394 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 586-87). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment,” *i.e.*, are “material.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Beyerbach*, 49 F.3d at 1326; *Hartnagel*, 953 F.2d at 394. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is “entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). The court will apply these standards to John Morrell’s motion for summary judgment on its breach-of-contract claim against ISO Pig.

John Morrell’s argument for summary judgment, in essence, is that it has established, beyond dispute, the elements of its breach-of-contract claim, but ISO Pig has

failed to generate any genuine issue of material fact on any legal defense to that claim. More specifically, John Morrell contends that it performed all of the terms of the agreements by paying the contract price for ISO Pig's market hogs, but that ISO Pig has admitted failing to perform the MVP Agreement and Renegotiated Agreement by failing to pay the outstanding negative ledger balance and by failing to deliver hogs after June of 2002, without legal excuse, which resulted in damage to John Morrell. Because ISO Pig did not file a brief in support of its resistance to John Morrell's motion for summary judgment, it is difficult for the court to discern the precise nature of ISO Pig's argument. However, it appears from ISO Pig's assertion that certain facts are disputed, as well as from Mr. Gernhart's affidavit purportedly generating genuine issues of material fact, that ISO Pig contends that John Morrell fraudulently induced ISO Pig to enter into the contracts by representing that market price for the hogs would be determined one way, but then breached the contracts by changing the way in which the market price for the hogs was determined. In reply, John Morrell asserts that ISO Pig has filed a resistance that does not comply with Local Rule 56.1, and that ISO Pig's resistance improperly relies on an affidavit that differs from the affiant's deposition testimony and is not based on the affiant's personal knowledge.

The court finds that John Morrell's argument that ISO Pig's resistance to John Morrell's summary judgment motion should be ignored, because it fails to comply with Rule 56.1 of the Local Rules of the United States District Court for the Northern District of Iowa, is a case of the pot calling the kettle black. In fact, neither John Morrell's motion nor ISO Pig's resistance complies with Rule 56.1. Specifically, John Morrell failed to file "[a]n appendix, filed separately, that complies with the requirements of section (e) of this rule." *See* N.D. IA. L.R. 56.1(a)(4) & (e). ISO Pig failed to file a resistance brief, separate statement of additional material facts precluding summary judgment, or an

appendix. *See id.* at (b)(1), (3), (4) & (e). In light of these “offsetting” deficiencies, the court will not grant or deny John Morrell’s summary judgment motion on the basis of noncompliance with the local rules. Nevertheless, the court notes that failure to comply with the local rules may *contribute* to a party’s failure to meet its burden on a motion for summary judgment.<sup>1</sup>

John Morrell also argues that Mr. Gernhart’s affidavit is not based on personal knowledge and, consequently, cannot defeat John Morrell’s summary judgment motion. As the Eighth Circuit Court of Appeals has recently reiterated, “Only admissible evidence may be used to defeat [a summary judgment] motion, *Shaver v. Independent Stave Co.*, 350 F.3d 716, 723 (8th Cir. 2003), and affidavits must be based on personal knowledge. Fed. R. Civ. P. 56(e).” *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1026 (8th Cir. 2004). Moreover, an affidavit supporting or opposing summary judgment must “show affirmatively that the affiant is competent to testify to the matters stated therein.” FED. R. CIV. P. 56(e); *see also Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 728 (8th Cir. 2001) (citing this portion of the rule and rejecting a lawyer’s affidavit that “contain[ed] no pretense that [the affiant] ha[d] personal knowledge about the subject in issue”). Mr. Gernhart’s affidavit avers that he is the President of ISO Pig and that he signed the MVP Agreement on behalf of ISO Pig. *See* Gernhart Affidavit at ¶¶ 1 & 2. Although not perfect, these averments are probably sufficient to indicate that Mr. Gernhart is competent to testify to the representations made by John Morrell in the course of negotiating the contract, what ISO Pig understood the basis for market price calculations

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<sup>1</sup>In this regard, John Morrell’s failure to comply with the appendix requirements of Local Rule 56.1 is less damaging than ISO Pig’s failures to comply with the rule, because John Morrell attached the documents that would likely have made up the appendix, and the court can, therefore, ascertain the factual basis for John Morrell’s arguments.

under the contract would be, that John Morrell subsequently changed the basis for the market price calculation, and that the change in the market price calculation and market conditions resulted in ISO Pig running up a significantly larger negative ledger balance than it would have under the expected market price calculation. These averments are also sufficient to indicate the competence of Mr. Gernhart to testify as to what John Morrell representatives told ISO Pig representatives about both the effect of the change in prices and what they told ISO Pig representatives about ISO Pig's lack of options other than continuing with the contracts. Thus, the court is not persuaded to disregard Mr. Gernhart's affidavit on this ground, either.<sup>2</sup>

A closer question is presented by John Morrell's contention that Mr. Gernhart's affidavit should be disregarded, because it differs from his deposition testimony. This court most recently considered such an argument in a published decision in *Pioneer Hi-Bred International, Inc. v. Ottawa Plant Food, Inc.*, 283 F. Supp. 2d 1018, 1027-29 (N.D. Iowa 2003). The court will not now reiterate the whole of that discussion. However, as a general matter, suffice it to say that this court distinguished between creation of a "sham" issue of fact, on the basis of an affidavit that is contradictory to deposition testimony, on the one hand, and affidavit testimony that is consistent with prior deposition testimony, or that simply adds more detailed information, or explains ambiguities or confusion in prior deposition testimony, on the other. *See id.* Thus, "clarifications and amplifications" in an affidavit, particularly where they are adequately explained, do not offend the standards of Rule 56 and applicable case law. *Id.* at 1028. Here, John Morrell points out that, in Mr. Gernhart's deposition testimony, Mr. Gernhart admitted that ISO

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<sup>2</sup>Although John Morrell contends that the affidavit is not even signed by Mr. Gernhart, the copy of the affidavit eventually provided to the court is signed by Mr. Gernhart.



Pig does not dispute that it owes John Morrell \$826,613.58, as the negative balance on its ledger account, and in response to the question, “[W]hy hasn’t ISO Pig paid Morrell this amount?”, Mr. Gernhart answered, “We don’t have the money.” *See* Gernhart Deposition at p. 35, ll. 13-25, p. 36, l. 1. John Morrell contends that this statement is flatly contradicted by Mr. Gernhart’s statement in his affidavit that “as a result of [John Morrell’s] change [in market price calculation] and market conditions at all times there resulted . . . a significant[ly] higher ledger balance being generated under the contract,” which constituted breach of contract by John Morrell causing damage to ISO Pig. *See* Gernhart’s Affidavit at p. 2, ¶¶ 6-8. The affidavit testimony does contradict, without explanation, the prior deposition testimony admitting the amount due on the contract and that the reason for failure to pay was lack of money, not, for example, prior breach by John Morrell. *See Pioneer Hi-Bred Int’l, Inc.*, 283 F. Supp. 2d at 1027-29. While the affidavit testimony would not be inconsistent with deposition testimony such as, “we couldn’t pay the money *and didn’t think we owed it*,” because the affidavit testimony could then be taken as an amplification or clarification of the prior testimony, that is not the context here. *See id.* at 1028 (“amplification” and “clarification” of deposition testimony by a subsequent affidavit is permissible). Indeed, ISO Pig does not even attempt to provide a larger segment of deposition testimony to put in context Mr. Gernhart’s prior admission that ISO Pig owed the negative ledger balance stated by John Morrell and did not pay it because ISO Pig didn’t have the money, nor does ISO Pig try to show how the statement is consistent with, or only an amplification or clarification of, Mr. Gernhart’s prior deposition testimony. *Id.* (differences between a summary judgment affidavit and deposition testimony may be permissible if the reasons for the differences are adequately explained). Thus, the court must disregard the critical averments of Mr. Gernhart’s

affidavit aimed at generating a genuine issue of material fact to defeat John Morrell's motion for summary judgment.

Even supposing that Mr. Gernhart's affidavit was not contradictory to his deposition testimony, however, the court still could not find that ISO Pig has generated genuine issues of material fact that would defeat John Morrell's motion for summary judgment. This is so, because the court may consider the affidavit with what is undisputed in the summary judgment record, and conclude that the evidence is such that no reasonable fact finder could return a verdict for the non-movant. *See, e.g., Herring v. Canada Life Assur. Co.*, 207 F.3d 1026, 1031 (8th Cir. 2000) (citing *Matsushita*, 475 U.S. at 587). John Morrell is correct that, to prove a breach-of-contract claim under Iowa law, the claimant must prove the following elements: (1) the existence of a contract between the parties; (2) the terms and conditions of the contract; (3) that the claimant performed all the terms and conditions required under the contract; (4) that the defendant breached the contract in some particular way; and (5) that the claimant suffered damages as a result of the breach. *See, e.g., Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). "A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Id.* (citing *Magnusson Agency v. Public Entity Nat'l Co.*, 560 N.W.2d 20, 27 (Iowa 1997)). ISO Pig's contentions that John Morrell misrepresented the pricing basis for the contract to induce ISO Pig to enter into the contracts, which might defeat element one, and changed the pricing basis in breach of the contract, which might defeat element three, fail as a matter of law in the face of the actual contract terms. *See Herring*, 207 F.3d at 1031 (averments in an affidavit may be compared with what is undisputed in the summary judgment record). The signature page of the original MVP Program Participation Agreement states, *inter alia*, that "Producer(s)

will receive the M.V.P. market price (as defined on page 2 of the contract) plus (+) \$1.50/cwt.” Plaintiff’s Exhibit 3. On page two of the contract, the contract provides,

Prices under the MVP Program will be determined in conjunction with the carcass merit program of Morrell in effect at the time of deliver. Morrell reserves the right to modify its carcass merit program at any time during the three-year term to respond to changes in industry standards, product marketability, and advances in evaluation procedures.

Plaintiff’s Exhibit 2 at p. 2. Thus, the original contract provided that John Morrell had the right to modify pricing under the contract. Similarly, the Renegotiated Agreement provides as follows:

The Base Price for Market Hogs delivered to Morrell by Producer and accepted by Morrell shall be the Iowa/Southern Minnesota USDA Mid-Day Weighted Average on the day of delivery, plus 1.85/cwt. live. Should the USDA no longer publish such an average, then Morrell shall select the market reported price that best approximates the Iowa/Southern Minnesota USDA Mid-Day Weighted Average and that market reported price shall be the price used to determine the Base Price for all such deliveries thereafter.

Plaintiff’s Exhibit 5 at ¶ 4(A). Thus, the Renegotiated Agreement also gave John Morrell the right to modify the pricing under the contract in precisely the situation that Mr. Gernhart’s affidavit states obtained here, that is, the situation in which the USDA discontinued the Iowa/Southern Minnesota USDA Mid-Day Weighted Average. Based upon the undisputed language of the contracts, ISO Pig cannot prove either misrepresentation of the pricing mechanism under the contracts as an inducement to contract or prior breach by John Morrell of the contracts by modifying the pricing. Thus, these purported defenses to John Morrell’s breach-of-contract claim fail as a matter of law.

Under the circumstances, ISO Pig has failed to go beyond the pleadings, and by affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial” on the elements of John Morrell’s breach-of-contract claim. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka*, 122 F.3d at 562; *McLaughlin*, 50 F.3d at 511; *Beyerbach*, 49 F.3d at 1325. Consequently, John Morrell is entitled to summary judgment on its breach-of-contract claim. See FED. R. CIV. P. 56(a) (summary judgment for claimant) & (c) (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”).<sup>3</sup>

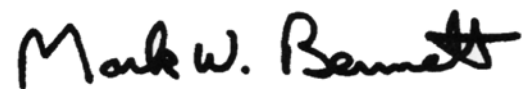
THEREFORE, John Morrell’s January 1, 2004, Motion For Summary Judgment (docket no. 13) is **granted**. This matter will proceed to trial only on ISO Pig’s counterclaim.

**IT IS SO ORDERED.**

**DATED** this 13th day of April, 2004.

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<sup>3</sup>The court notes that neither party moved for summary judgment on ISO Pig’s fraudulent inducement counterclaim. Notwithstanding that the elements that distinguish between a claim for damages for fraud in the inducement and an equitable defense of fraudulent inducement to a breach-of-contract claim may not be at issue here, *see Dishman v. American Gen. Assur. Co.*, 193 F. Supp. 2d 1119, 1124-25 (N.D. Iowa 2002) (distinguishing between an equitable action to rescind a contract based on fraud, fraudulent inducement as an equitable defense to a breach-of-contract claim, and an action at law for damages based on fraud, citing, *inter alia*, *Hylar v. Garner*, 548 N.W.2d 864 (Iowa 1996), as explaining these distinctions), the court cannot enter summary judgment in John Morrell’s favor on ISO Pig’s counterclaim in the absence of notice and an opportunity to respond.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is fluid and cursive, with a horizontal line extending from the end of the name.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA